IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5948 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANAGER

Versus

KISHANBHAI KESAVBHAI

Appearance:

MR KN PATEL for Petitioner

MR AK CLERK for Respondent No. 1

CORAM : MR.JUSTICE C.K.THAKKAR

Date of decision: 15/03/2000

ORAL JUDGEMENT

This petition is filed by the petitioner Niranjan Mills Limited through its Manager, praying therein to quash and set aside aside the order, daterd June 27, 1989 passed by the Appellate Authority, under the Payment of Gratuity

Act, 1972, (hereinafter referred to as `the Act').

Shortly stated, the facts are that the respondent was working as "Badli worker" with the petitioner since 1973. He resigned from the Mills on 31st August, 1988. According to him , he had actually worked for 248 days in 1977-78and since the period exceeded 240 days, he was entitled to payment of gratuity. His case,however, was that he would also be entitled to gratuity for other period which has been mentioned in form I submitted to petitioner Mill for the period from 1978-79 to 1985-86.

He filed an application, since the petitioner was not given gratuity, before the Controlling Authority under the Act on 10th October 1988. Notice was issued by the Authority and after hearing the parties, the controlling authority held that from the evidence on record, it was proved that the respondent had worked for more than 240 days only in one year i.e. in the year 1977-78 and for the remaining period, he had not actually worked for 240 days or more and hence, he was not entitled to gratuity for those years. Accordingly, the application was dismissed.

Being aggrieved bay the said order, Appeal No. 12 of 1989 was preferred by the workman under Section 7 of the Act. Considering the provisions of the Act in the light of subsequent amendment in the Act by the Payment of Gratuity (Second Amendment) Act, 1984 (25 of 1984) and insertion of Section 2-A, the Appellate Authority held that the Controlling Authority had committed an error of law in not invoking provisions of Section 2A and in not holding that the workman was entitled to payment of gratuity for the remaining period also. In the opinion of the Appellate Authority, in the light of the amendment and insertion of Section 2-A in 1984, the ratio laid down by the Supreme Court in Lalappa Lingappa vs.Laxmi Vishnu Textile Mills, AIR 1981 SC 852, would not apply and the workman was entitled to gratuity . Accordingly, the petitioner mill was directed to pay an amount of Rs. 9,639/- (Rs. Nine thousand six hundred thirty nine only). The appeal was thus allowed. The said order is challenged by the petitioner mill.

Rule was issued and interim relief was granted on 17th August, 1989 . The petition has now been placed for final hearing.

I have heard Mr. K. N. Patel for the petitioner and Mr. A.K. Clerk for the respondent.

Mr. Patel submitted that the point is no longer res-integra so far as this Court is concerned. He stated that in similar circumstances, in Mafatlal Fine, Spinning and Manufacturing Company vs. Ramachhar B Mishra, 1996 (2) GLH 323, a learned Single Judge of this Court held that even after insertion of Section 2-A in the Act in 1984, the legal position has not been changed and the law laid down in Lalappa Lingappa would still apply. He further submitted that so far as Badli employees are concerned, as held by the Honourable Supreme Court as well as by this Court, such employees would be entitled to gratuity for the year in which they have "actually worked" for 240 days and if they have worked for less than 240 days , they would not be entitled to claim gratuity. He further submitted that in fact, several orders came to be passed by the same Appellate Authority on the same day i.e. on 27th June, 1989, that is, the day on which the order impugned in the present petition was passed and two of them came up for consideration in Mafatlal Company and the learned Single Judge held that the Appellate Authority had committed an error of law in granting benefit of gratuity to such workmen. Accordingly, petitions were allowed and the orders passed by the Appellate Authority were set aside and the orders passed by the Controlling Authority were restored. Mr. Patel, therefore, submitted that the point is covered by the learned Single Judge and the present petition deserves to be allowed.

Mr. Clerk, on the other hand, supported the order passed by the Appellate Authority. He submitted that it is true that the employee must have worked for 240 days. He, however, strongly argued that the expression "actually worked" must be interpreted in the light of the subsequent decision of Supreme Court in Workmen of American Express International Banking Corporation vs. American Express International Banking Corporation, (1985) 4 SCC 71. In Workmen of American Express International Banking Corporation, the Supreme Court observed ,while considering the provisions of Section 25F of the Industrial Disputes Act, 1947 that the expression "actually worked under the employer" in Section 25-B (2) (a) (ii) must necessarily comprehend all those days during which the workman was in the employment and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, Standing Orders etc.

Considering the said enactment, in par 5, it was observed:

"5. Section 25-F of the Industrial Disputes Act is plainly intended to give relief to retrenched workmen. The qualification for relief under section 25-F is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in Section 25-B of the Industrial Disputes Act.In the present case, the provision which is of relevance is Section 25-B (2) (a) (ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if the workman, during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is "actually worked under the employer" . This expression, according to us, cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of status, standing orders etc. The learned counsel for the Management would urge that only those days which are mentioned in the Explanation to Section 25-B (2) should be taken into account for the purpose of calculating the number of days on which the workmen had actually worked though he had not so worked and no other days. We do not think that we are entitled to so constrain the construction of the expression "actually worked under the employer". The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression "actually worked under the employer" is capable of comprehending the days during which the workman was in employment and was paid wages- and we see no impediment to so construe the expression- there is no reason why the expression should be limited by the explanation. To give it any other meaning than what we have done would bring the object of Section 25-F very close to frustration. It is not necessary to give examples of how Section

25-F may be frustrated as they are too obvious to be stated.":

My attention was also invited to the fact that Lalappa Lingappa was distinguished by the Court in the said case. In para 6, the Supreme Court stated-

"6. The learned authority on which reliance was placed by the learned counsel for the Management was Lalappa Lingappa vs. Laxmi Vishnu Mialls Ltd. We may straightaway say that the present question whether Sundays and paid holidays should be taken into account for the purpose of reckoning the number of days on which an employee actually worked, never arose there. The claim was under the Payment of Gratuity Act. All permanent employees of the employer claimed that they were entitled to payment of gratuity for the entire period of their service, that is, in respect of every year during which they were in permanent employment irrespective of the fact whether they had actually worked for 240 days in a year or not. The question there was not how the 240 days were to be reckoned' the question was not whether Sundays and paid holidays were to be included in reckoning the number of days on which the workmen actually worked; but the question was whether a workman could be said to have been actually employed for 240 days by the mer fact that he was in service for the whole year whether or not he actually worked for 240 days. On the language employed in Section 2 (c) of the Payment of Gratuity Act, the court came to the conclusion that the expression "actually employed" occurring in Explanation I meant the same thing as the expression "actually worked" occurring in Explanation II and that as the workmen concerned had not actually worked for 240 days or more in the year they were not entitled to payment of gratuity for that year. The further question as to what was meant by the expression "actually worked" was not considered as apparently it did not arise for consideration. Therefore, the question whether Sundays and other paid holidays should be taken into account for the purpose of reckoning the total number of days on which the workmen could be said to have actually worked was not considered in that case. The other cases cited before us do not appear to

have any bearing on the question at issue before us."

Mr. Clerk, therefore, submitted that the period during which an employee could not serve either because those days were Sundays or Public holidays, they would have to be considered while interpreting the expression "actually worked" and if such interpretation is given, the respondent would be entitled to gratuity and the Appellate Authority has come to a correct conclusion. Mr. Clerk also referred to a decision of the High Court of Andhra Pradesh in D.B.R. Mills vs. Appellate Authority, 1985 Lab.IC 612. Considering the provisions of the Act and the decision of the Supreme Court in Lalappa Lingappa, the Division Bench held that in computing 240 days during which an employee has actually worked, Public holidays including Sundays cannot be excluded and if by including of those days, an employee completes service of 240 days, he would be entitled to gratuity under the Act.

In my opinion,however, the point is directly concluded by the learned Single Judge of this Court in Mafatlal Company In that case also, an identical question came up for consideration before this Court as to whether "Badli workmen" who had not actually worked for 240 days can be said to have "actually worked" and in calculating such service,the period of Sundays and Public Holidays would be included and he would be entitled to payment of gratuity. Considering the provisions of Section 2 and Section 2-A as inserted in 1984, and applyig Lalppa Lingappa, the Court in para 13 stated as under:

"13. If the effect of this amendment is to be considered on the view which had been taken by the Supreme Court in Lalappa Lingappa's case it appears that through this amendment, what was denied to the permanent employees on account of their working for a period of less than 240 days in a year by remaining absent from duty without leave, has been granted so as to include such period for the purposes of continuous service and thus, the benefit which stood denied to the permanent employees was taken care of in terms of the amended Section 2A and now even the period of absence without leave in case of permanent employee has to be treated as a part of continuous service for the purposes of payment of gratuity under Section 4 of the Act. However,

the case of badli employees is covered under Section 2A (2)(a)(ii) for the purpose of continuous service and badli worker is an employee ,who is not in a continuous service within the meaning of clause (1) of Section 2A and he is to be deemed to be in continuous service under the employer only if he has worked for not less than 240 days and therefore, the amendment of Section 2A does not enure any benefit in favour of the badli employees because they are still not covered by the substantive part of the definition of `continuous service'. There is no question of their absence from duty without leave because they are required to render the service only when the job is available for them and as has been dealt with by the Supreme Court , they are working only as `spare men' who cannot even said to be employed while they are waiting for a job. It is therefore clear that despite the amendment of Section 2A with regard to the continuous service, the legal position in respect of the badli employees for the purpose of claiming gratuity remains the same so much so that even the definition of badli as per the standing orders applicable to the employees of the petitioner company are in pari materia with the definition of badli as has been considered by the Supreme Court in the aforesaid judgment of Lalppa Lingappa vs. Laxmi Vishnu Textile Mills. Both the definitions are as under:

Badli as considered in Lalappa Lingappa's case:

A `badli' is one who is employed on the post of a permanent operative or probationer who is temporarily absent.

Badli as per the standing orders applicable to the present petitioner company and its employees.

A `badli' is one who is employed on the post of a permanent operative or probationer who is temporarily absent".

A conclusion has been reached in para 14 in the following terms:

"Thus, I have no hesitation in holding that the appellate authority wrongly allowed the appeal of

> the respondent on the basis that after the amendment of 1984 in the Payment of Gratuity Act, the decision rendered by the Supreme Court in Lalappa Lingappa's case was of no avail to the petitioner. So far as the badli employees are concerned, the Supreme court decision in Lalppa Lingappa's case holds the field and the legal position with regard to the term of continuous service applicable to the badli employees remains the same and it is necessary for the badli employees to have completed 240 days of service in a given year prior to his becoming permanent so as to be entitled for gratuity for that period."

Thus, in Mafatlal Company direct question whether Badli workman would be entitled to payment of gratuity and in calculating actual service , Sundays and public holidays could be excluded or not was before this Court. Considering the definition of `badli workman' in Lalppa Lingappa and describing badli workman as `Spare men' who cannot be said to be employed , if the learned Single Judge has taken the view that they would not be entitled to gratuity and the Appellate Authority was wrong in awarding payment of gratuity to badli workers who have not actually worked for 240 days, it cannot be said that the said point requires reconsideration. The questions which fell for determination before the Supreme Court in Workmen of American Express International Banking Corporation as also in D.B.R.Mills were different.

In my opinion, therefore, the petition deserves to be allowed and is accordingly allowed. The order passed by the Appellate Authority deserves to be set aside and the order passed by the Controlling Authority deserves to be restored and is accordingly restored. Rule is made absolute. No order as to costs.

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parekh